United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7176

To be argued by
NED R. PHILLIPS

In The

United States Court of Appeals

For The Second Circuit

B

ANDY DINKO, individually and on behalf of the members of the National Maritime Union of America,

Plaintiff-Appellant,

vs.

P/S

SHANNON J. WALL, as President of the National Maritime Union of America and individually, JOSEPH CURRAN, as past President of the National Maritime Union of America and individually, MEL BARISIC, as Secretary-Treasurer of the National Maritime Union of America and individually, PETER BOCKER, JAMES MARTIN and RICK MILLER, as Vice-Presidents of the National Maritime Union of America and individually, ANDREW RICH, as New York Branch Agent of the National Maritime Union of America, ABRAHAM E. FREEDMAN, LEON KARCHMER and MARTIN E. SEGAL, as former Trustees of the National Maritime Union Officers' Pension Plan and individually, and the AMALGAMATED BANK OF NEW YORK, as Successor Trustee of the National Maritime Union Officers' Pension Plan and Trustee for the National Maritime Union Staff Pension Plan,

Defendants-Appellees.

BRIEF FOR DEFENDANTS-APPELLEES

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UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 76-7176

ANDY DINKO, individually and on behalf of the members of the National Maritime Union of America,

Plaintiff-Appellant,

-against-

SHANNON J. WALL, as President of the National Maritime Union of America and individually, JOSEPH CUPRAN, as past President of the National Maritime Union of America and individually, MEL BARISIC, as Secretary-Treasurer of the National Maritime Union of America and individually, PETER BOCKER, JAMES MARTIN and RICK MILLER, as Vice-Presidents of the National Maritime Union of America and individually, ANDREW RICH, as New York Branch Agent of the National Maritime Union of America, ABRAHAM E. FREEDMAN, LEON KARCHMER and MARTIN E. SEGAL, as former Trustees of the National Maritime Union Officers' Pension Plan and individually, and the AMALGAMATED BANK OF NEW YORK, as Successor Trustee of the National Maritime Union Officers' Pension Plan and Trustee for the National Maritime Union Staff Pension Plan,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF APPELLEES

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Did the Court below commit error in its application of the guidelines enumerated by this Court as to the test of Good Cause in an action brought under 29 U.S.C. §501?

II. Can an Appellate Court consider materials outside the record of the Court below?

STATEMENT OF THE CASE

This action was commenced by Appellant Andy Dinko against Appellees, officers of National Maritime Union of America, AFL-CIO ("NMU"), pursuant to Section 501 of the Labor Management Reporting and Disclosure Act, 29 U.S.C. §501 (the "Act"). In his complaint, Appellant alleged that these officers breached their fiduciary obligations to NMU in several different respects. Essentially these alleged violations can be reduced to three categories:

1. Allegations that relate to the revision by the Union of the NMU Officer's Pension Plan;

2. Allegations that certain financial and membership data has not been made available to appellant and other NMU members; and

3. Allegations that the defendant officers have misappropriated Union funds.

Under Section 501(b) of the Act, a party is required to obtain leave of the court to commence an action. On January 27, 1975, the District Court (Frankel, J.) granted Appellant's ex parte application for leave to commence this action.

After joinder of issue, Appellant's deposition was taken over two sessions - on April 15 and April 21, 1975. Appellees thereupon moved to dismiss the complaint pursuant to Rule 12(b) of the Federal Rules of Civil Procedure on the ground that the Court below lacked jurisdiction over

the subject matter of the action. This motion was bottomed on the contention that plaintiff had not and could not make the requisite showing of "good cause" to commence this action. In support of their motion, Appellees relied upon Appellant's deposition and other pertinent documents.

On August 4, 1975, the District Court (Werker, J.) granted the motion to dismiss on the ground that Appellant had failed to satisfy two of the prerequisites set forth in Section 501(b):

> a) The requirement of submitting a request to the Union or its officers to sue to recover damages or secure an accounting or other appropriate relief; and
>
> b) The requirement of showing "good cause" to commence the action.

Accordingly, the District Court held that it lacked jurisdiction over the subject matter of the action and dismissed the complaint without prejudice to Appellant commencing a new action upon compliance with the procedural requirements of Section 501(b).

In its prior decision in this matter, Dinko v. Wall, 531 F.2d 68 (2d Cir. 1976), this Court reversed the District Court as to the first prerequisite, finding that Appellant's letter of December 17, 1974 fulfilled the demand requirement. The Court defined for the first time the previously amorphous term "good cause" and remanded this matter to Judge Werker to set forth his reasoning within the two

newly established parameters.

"Good cause" was defined

> "...to mean that plaintiff must show a reasonable likelihood of success and, with regard to any material facts he alleges, must have a reasonable ground for belief in their existence."(Id. at 75.)

Using these guidelines, Judge Werker reviewed the evidence and found that plaintiff below had failed to satisfy either of the cited criteria and in his opinion and findings of fact, reported at 421 F. Supp. 207, again dismissed the complaint.

ARGUMENT

POINT I: THE COURT BELOW DID NOT COMMIT ERROR IN FINDING THAT PLAINTIFF FAILED TO MEET THE STATUTORY REQUIREMENT OF "GOOD CAUSE"

Appellant's allegations of wrong-doing are set forth in paragraph "15" of his Complaint which, inter alia, attacks the sufficiency of the "spread" or notice published in the November 1974 PILOT[1] describing the proposed revision of the NMU Officers' Pension Plan to be voted on at all regular branch membership meetings on November 25, 1974. The article was published pursuant to Article 4 of the NMU Constitution which requires that changes in Union policy requiring membership approval be spread in the

---

[1] The "PILOT" is the official organ of the NMU and is published monthly. The article in question is set forth at pages 32a-33a in Appellees' Appendix.

PILOT before the membership vote. Article 4 provides in pertinent part:

> "Section 1 - Principle: All decisions of the National Council, and the National Office between Conventions, which change the established policies, programs, and procedures of the Union must first be approved by the membership before they are made effective.
>
> Section 2 - Method: Membership approval referred to in Section 1 of this Article shall be obtained in the following manner:
>
> (a) The decision of the National Council and/or the National Office shall be spread in full in the NATIONAL MARITIMF UNION PILOT of a special newsletter, provided that action on the decision is not required before the PILOT or special newsletter can be published and distributed to the membership. The decision shall then be read at the regular membership meeting in each Branch office operated by the Union, provided that in the event a regular membership meeting is not scheduled within the time necessary for action upon the decision, the decision shall then be read in full at a special membership meeting called for that purpose. After discussion by the membership, action upon the decision shall be taken by vote of the membership present. The approval of a majority of the total members voting in all Branches shall be required in order to make the decision operative.
>
> (b) Emergency decisions requiring immediate action for the protection of the Union shall be read at regular membership meetings in all Branches. In the event a regular membership meeting is not scheduled within the time necessary for action upon the decision, the decision shall then be read in full at a special membership meeting called for that purpose. After discussion by the membership, action upon the decision shall be taken by vote of the membership present. The approval of a majority of the total members voting in all Branches shall be required in order to make the decision operative."

The proposed NMU Staff Pension Plan and the NMU Officers'Pension Plan which it replaced are lengthy documents which could not readily be republished in their entirety in the PILOT. (17a)[2] Accordingly, a summary of the Staff Plan and its differences from the Officers' Plan was published in the PILOT and the full texts of the Plans were made available for inspection during the month of November 1974 at all NMU branch offices.

In his verified application and at his deposition Appellant charged that the PILOT "spread" was inaccurate, incomplete and misleading because (18a):

1. The differences between the proposed and existing Plans were not enumerated;

2. The formula upon which benefits were to be computed was not stated;

3. The amount of money to be allocated and the type of benefits payable were not described;

4. The total amount to be funded from the NMU treasury was not stated;

5. The cost to each member was not set forth; and

6. There was indication that the NMU National Office would determine eligibility and compute and certify benefits.

A reading of the article in dispute clearly answers the charges raised above. The article expressly undertakes

[2] All citations, unless otherwise noted, are to pages in Appellees' Appendix.

to explain the differences between the Staff and Officers' Plans in areas of coverage, funding, costs, benefits and administration and to give the reasons why charges were proposed. It specifically states that:

1. $350,000 will be transferred from the NMU General Fund to fund the revised Plan;

2. Contributions to the Plan from the Union will be at a rate of no more than 26% of base pay of the officers and non-officers covered by the Plan;

3. The benefit formula will be computed on the basis of earnings in the best of 5 of the last 10 years of employment instead of all service since 1963. (This change was previously approved by the membership in May 1972);

4. The National Office will act as the Pension Committee for the Plan and will be responsible for all basic policy determinations; and

5. Officers of the union and non-officer employees, who are not otherwise covered by the Union for pension purposes, will be covered by the Plan.

Appellant's contentions that the PILOT article was not "understandable to the average Union member" (Brief of Plaintiff-Appellant, p.8) is not only insulting to the membership, but also is controverted by the comments and questions on this matter as reflected in the minutes of the New York Branch membership meeting held on November 25, 1974. (38a-44a) A reading of these minutes indicates a knowledgeable membership with a good grasp of this issue.

Judge Werker carefully analyzed the PILOT article and the two Plans, and concluded that the article contained "a cogent, concise explanation" of and set forth in full all proposed changes in the Plan. Thus, it satisfied the requirements of Article 4, Section 2(a) of the NMU Constitution. Appellant had no likelihood of success with respect to this charge, and the alleged material facts turned out to be nonexistent.

Paragraph 15(b) of the complaint alleges that Appellant and other NMU members were denied an opportunity to inspect the full texts of the Staff and Officers' Pension Plans. Both in his affidavit in support of his application to commence this action and at his deposition, Appellant swore that Evaristo Rodriguez and Emanuel Van Eckelen had told him that they had been denied access to these texts. (20a) However, statements by these members (34a-37a), submitted to the Court below, totally refute these allegations. Mr. Rodriguez never requested at the New York branch office to see copies of the Plans, as Appellant has alleged, nor did he ever tell Appellant that he had done so. Simiarly, Mr. Van Eckelen never went to the NMU office in Philadelphia to inspect the Plans nor did he ever tell Appellant that he had done so.

Appellant's descriptions of his own efforts to inspect the plans are completely contradictory. In his

affidavit, Appellant states that on November 15, 1974, he was told that Appellee Andrew Rich was not in town and therefore Appellant would not be able to see Rich on that day. (20a) Yet, at his deposition, Appellant testified that Rich was present and refused to allow Appellant to review the texts of the plans. As became the pattern throughout his testimony, Appellant could not recall the name of the member who accompanied him to Rich's office (Deposition at pp. 78-79). It is inconceivable that Appellant would not have recalled this confrontation at the time he executed his affidavit if it had actually taken place. Appellant had no reasonable ground other than his own fertile mind for belief in the existence of the nonexistent facts upon which he based paragraph 15(b) of the complaint.

Appellant charges in paragraph 15(c) that Appellees failed to make Spanish versions of the complete texts of the Plans available for inspection by the membership. This utterly fails to state a cause of action. As Judge Werker found, the NMU Constitution does not require that the Plans be made available in Spanish. Further, for those Hispanic members who have difficulty reading English, the changes in the Plan were set forth in full in Spanish in the PILOT. (See 33a) Appellant not only knew of the existence of this article, but had attached it as as exhibit to his papers seeking the Court's permission to bring this

action. The trial court correctly concluded that Appellant could not possibly succeed on this frivolous claim.

Paragraph 15(d) charges Appellees with having violated their statutory and fiduciary duties by failing

> "...to make available to plaintiff and other Union members in good standing an independent financial report or other adequate financial information on the NMU Officers' Pension Plan and the NMU Staff Pension Plan either through publication in the PILOT or at all NMU branch offices."

It should be noted initially that Appellant has nowhere alleged refusal of a demand for "adequate financial information" concerning these Plans. Certainly no such demand was made in Appellant's letter of December 17, 1974. Rather, that letter demanded "a complete accounting of all Union expenditures" relating to the Plans. (13a) This could only be interpreted to mean an accounting separate from that normally conducted for the annual report. Such an accounting would be extremely costly, time consuming, and burdensome; and, therefore, should not be ordered without some evidence of wrongdoing. Appellant has made no specific allegations which would require an accounting. The annual reports prepared by the auditors of the Plan are readily available for inspection by the membership. Appellant has never requested to see them.

Further, Appellant has stated no cause of action under 29 U.S.C. §307 or 29 U.S.C. §431. The former statute deals with the rights of participants and beneficiaries of pension and welfare plans. Appellant falls into neither

of these categories. He is not a Union employee entitled to coverage nor has he alleged that he has been designated a beneficiary by a covered individual.

29 U.S.C. §431 (a)(5)(c) requires the Union to include in its annual report filed with the Secretary of Labor a statement dealing with its "participation in insurance or other benefit plans." Pursuant to Section 431(c), a member has the right to necessary documents to verify this annual report upon a showing of "just cause." Appellant has not alleged a failure to file this annual report nor anything approaching "just cause" to believe the report is incomplete or inaccurate. Thus, as Judge Werker held, Appellant lacks standing to make the demand alleged in paragraph 15(d). (421 F.Supp. at 211-213)

Appellant claims in paragraph 15(e) that at the New York Branch meeting held November 25, 1974, Appellees refused the membership an opportunity to express their views on the proposed revision of the Officers' Pension Plan. This allegation clearly underlines the vexatious nature of this suit and Appellant's utter lack of credibility.

Minutes of each membership meeting are transcribed and made available to the membership. Appellant attached a copy of the November 25, 1974 NMU meeting minutes to his verified application to bring this action and referred to them in this application. A review of these minutes unquestionably indicates that there was a lengthy debate on the issue of

the proposed revisions of the Plan in which several members spoke out vehemently in opposition. (21a-22a, 38a-44a) This open discussion was eventually terminated by an appropriate motion from the floor, duly made and seconded. (44a) Appellant has absolutely no basis for his alleged belief that the members were not allowed to express their views concerning the Plans.

Paragraph 15(f) alleges that Appellees have not made available "information respecting the NMU's true and complete liabilities and disbursements." Appellant has conceded, however, that periodic financial reports setting forth information on NMU's liabilities and disbursements are published regularly in the PILOT. (14a) Appellant at his deposition was unable to state one fact to support his contention that these reports had been inaccurate or even that he ever knew of any such fact. (14a)

NMU files annual "LM-2" reports with the United States Department of Labor which contain detailed information on the Union's receipts and disbursements. These reports are filed pursuant to statute (29 U.S.C. §431), and are available for inspection by all members. (14a) Appellant failed to show good cause to challenge the accuracy of these reports and is obviously trying to use this proceeding to conduct a fishing expedition.

At the time Appellees made their motion to dismiss, Appellant was represented by counsel. It is significant that

no attempt was made in said counsel's reply papers to fill the gaps left by the lack of facts to support this or any other of Appellant's contentions. This lack strongly supports an inference that Appellant had no reasonable basis on which to make these allegations.

This lack of support for Appellant's claims led Judge Werker to conclude that the "information" upon which Appellant allegedly based paragraphs 15(f) through (l) of his Complaint

> "...was not such as an average person would rely upon to make a claim. The information at best would be classified as rumor or what sailors know as scuttlebutt." (421 F. Supp. at 213)

Judge Werker's conclusion is the only one which can be drawn from Appellant's consistent attempts to lay the foundation of his case with vague statements supposedly made by members whose names Appellant does not know or is mysteriously unable to divulge. In the rare instance that Appellant did name the members who allegedly provided the information, Messrs. Rodriguez and Van Eckelen stepped forward to prove Appellant's unreliability and his tendency to make false, unfounded statements.

This practice of Appellant is clearly demonstrated by his attack on several alleged staff employment contracts in paragraph 15(g). This paragraph names five NMU employees and alleges that each has an employment contract which would guarantee pensions and severance pay from the NMU's general treasury should the Staff Pension Plan be invalidated.

Appellant admitted at his deposition that he has never seen any such contracts. (5a) He says he was told about the existence of employment contracts by various members, whose names he cannot or will not recall. Most unbelievably, these phantom members did not tell Appellant (and presumably were not asked) anything about the contents of these contracts. (5a-6a) Upon what information Appellant based this contention is purely guesswork.

Further, Article 8, Section 11(a) of the NMU Constitution expressly permits the National Office to establish rates of pay and fringe benefits,specifically including pensions, for Union employees. That section provides:

> "(a) The employment of technical, clerical, administrative and other personnel necessary for the effective administration of the Union's affairs shall be the responsibility of the National Office. The National Office is authorized to establish the compensation for such personnel, including pension, welfare and other fringe benefits. Plans or programs for providing pension, welfare and other fringe benefits may be combined with similar plans or programs for providing such benefits to officers of the Union."

Appellant, thus, cannot establish the existence of any contracts, nor can he hint at what is improper about them if they do exist.

Appellant complains in paragraph 15(h) about the failure to notify the membership of these contracts. Appellant's utter lack of good cause belief in the existence of these contracts naturally disposes of this claim. It should also be noted that there is no requirement in the

NMU Constitution or in any statute that individual employment contracts with Union employees must be published in the PILOT or kept available at branch offices. Nor is there any indication that Appellant or any other member has ever requested an opportunity to see such contracts. (5a-6a) Appellant's letter of December 17, 1974 surely makes no such request, and his testimony regarding his oral requests to inspect these contracts is totally unbelievable in light of this omission and his other testimony and sworn statements. (6a) Surely, Appellant would have mentioned his supposed requests of November 15 and 25, 1974, in this letter -- an artfully drawn, planned precursor to this litigation -- if they, in truth, had been made.

Paragraph 15(i) alleges that individuals elected to union office have been appointed to different positions in order to pay them two or three times their regular salaries. Appellant, of course, does not and cannot refer the Court to any section of the NMU Constitution nor to any statute which would prohibit an interim appointment or an increase in pay when an officer takes on duties far in excess of those of the office to which he was initially elected, as no such rule or statute exists. Appellant failed to support this allegation with any specifics before the District Court although he had ample opportunity to do so -- both at his deposition (8a-9a) and in response to Appellees' motion to dismiss. In his Brief to this Court,

Appellant for the first time presents specific allegations concerning Elwood Hampton. It is well-settled that the Court of Appeals cannot consider facts not before the Judge below. (See infra.) Appellant made no attempt to make these allegations to Judge Werker. He was represented by counsel at the time and offers no excuse for his failure to do so. This Court should not consider these allegations which are first presented at this time.

However, should this Court consider the matter of Mr. Hampton, it would realize Appellant has failed to state a cause of action in his paragraph 15(i). Appellant admits that Mr. Hampton's duties as Regional Representative cannot compare with those of a normal Patrolman. They are on a national level, involving supervision and enforcement of a nation-wide, complex collective bargaining agreement. The position thus required Mr. Hampton to perform extensive additional duties. The additional salary for those union officials serving as Regional Representatives has been consistently passed upon and approved by the membership at regular meetings or the National Convention, as Appellant, himself, notes in his Brief (at p. 26a).

In Paragraph 15(j), Appellant alleges that NMU officers and employees have received "excessive and improper travel and expense allowances". As usual, Appellant was unable to give a single example of such misappropriation of Union funds. (9a-10a) Instead, he tries to hide behind vague comments allegedly made by phantom members. (10a)

He admitted at his deposition that at that time, some three months after having begun this action, he had no specific information which supported this extremely serious accusation.(10a) Judge Werker was certainly correct in his holding that Appellant had no reasonable basis for bringing this claim.

Appellant's Paragraph 15(l) is no more than a restatement of the allegations set forth in Paragraph 15(i) (See 11a), and therefore should have been and was similarly dealt with by the Court below.

Paragraph 15(l) of the complaint charges that a "shlush" (sic) fund has been created to pay unauthorized out-of-pocket officer and staff expenses without any accounting for same. Appellant is completely bereft of any facts to support what is an outrageous charge of misappropriation of funds.(12a) Instead, he again can only lamely state that other members, whose names he does not know, have vaguely told him something about this general charge. (12a)

In Paragraph 15(m) Appellant alleges that defendants have failed to advise the membership that over 80% of union funds are on deposit with the Amalgamated Bank of New York. Appellant concedes he does not know whether this is true and does not state why it would be improper if it is true. (16a) Surely the officers of the Union have the right to select a bank for Union funds. The Amalgamated Bank's role as trustee of the NMU Staff Pension Plan does not disqualify the Bank as a depository of the general funds

of the Union, absent evidence of conflict of interest -- which has not been alleged or demonstrated in this case. It cannot be seriously argued that this paragraph states a viable cause of action.

Paragraph 15(n) of the complaint contends that shore-side NMU members in the Panama and Puerto Rico branches were not permitted to vote on the proposed Staff Plan at the November 1974 meetings. Appellant was not at the Panama and Puerto Rico branch meetings held in November 1974. (24a) Nor does he know anyone who was. (24a) He claims unnamed members give him this information but does not know where they are from nor whether they attended the meetings in question. (24a) On the other hand, Appellees have submitted proof that regular membership meetings were held in the Panama and Puerto Rico branches in November 1974 (23a, 49a-55a), and that the proposed Plan was voted upon and approved by the members thereat.

The procedure followed by Judge Werker in finding the obvious lack of "good cause" is no longer in issue. This Court has already approved of that process. Dinko v. Wall, 531 F.2d at 73-74. Appellant's tirade against the District Court therefore need not and should not be considered by this Court, other than as a demonstration of Appellant's tactics of unreasoned hysteria when he is disappointed -- whether in a judicial decision or in intra-union politics. It is in keeping with Appellant's attempts to vilify NMU

officials as Nazis, Communists, crooks, and thieves without any factual foundation (26a-30a) and with his equally unfounded accusations upon which he tries to base this action.

This Court has recognized and approved of the necessity of requiring plaintiffs in this type of action to prove "good cause", so as to protect union officials against "vexatious and harassing suits". Dinko v. Wall, 531 F.2d at 74. If ever a case called out for such protection, it is this one.

POINT II: AN APPELLATE COURT CANNOT CONSIDER MATERIALS OUTSIDE THE RECORD OF THE COURT BELOW

Throughout his Brief, Appellant attempts to introduce various matters and documents not presented to the Court below. While Appellant is now proceeding pro se, he had the assistance of knowledgeable counsel at all relevant previous times. None of the "documents" which Appellant has appended to his Brief as "Exhibits" were introduced before Judge Werker although Appellant and his counsel had ample opportunity to do so -- either in answer to Appellees' motion to dismiss, or upon a motion for rehearing. These "documents" (actually bits and pieces of testimony from other matters, correspondence and articles, some not even identifiable) and the references to them in Appellant's Brief cannot be considered by this Court.

The law in this Circuit was clearly and succinctly stated in International Business Machines Corp. v. Edelstein, 526 F. 2d 37 at 45 (2d Cir. 1975), wherein the Court said:

> "...absent extraordinary circumstances federal appellate courts will not consider rulings or evidence which are not part of the trial record. [Citations omitted] This is true whether the record is merely ambiguous or is affirmatively deficient with respect to any papers or orders of any kind. [Citations omitted] Moreover, it is of no avail to an appellant that the trial court itself may have prevented him from including a particular item in the trial record; the appellate court will not speculate about the proceedings below, but will rely only upon the record actually made".

Also see 5 C.J.S. §1480(c) at fn. 84 et seq., and 5 C.J.S. §1481 at fn. 33 et seq., and the many cases cited thereat.

To the extent this material is derived from another proceeding -- Morrissey v. Curran, 73 Civ. 204 (WCC) presently pending before Judge Conner of the United States District Court for the Southern District of New York -- it is obviously duplicative of that action. Neither the District Court nor Appellees should be required to go through the time and expense of trying the same matters twice. It is patently obvious that the only reason Appellant has brought this action is to harass Appellees and for personal aggrandizement. Judicial economy mandates the dismissal of this action.

CONCLUSION

The Court below had ample justification in the record for its finding that Appellant lacks "good cause" to bring this action. The decision below should be affirmed.

Respectfully submitted,

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COURT OF APPEALS
SECOND CIRCUIT

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- against -

SHANNON J. WALL, as President of the National Maritime Union of America and individually, JOSEPH CURRAN AS Past President of the National Martime Union of America, etc.
Defendants-Appellees.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF *ss.:*

I, Victor Ortega, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1715 Lacombe Avenue; Bronx, New York

That on the **18th** *day of* **April,** *19* **77** *at* **1. 30 Broad Street; N.Y., N.Y.**
2. 1 Chase Manhattan Plaza; N.Y., N.Y.

deponent served the annexed Brief *upon*

1. Zold Brandwein Meyers & Altman
2. Wilkie Farr & Gallagher

the *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein,*

Sworn to before me, this **18th**
day of **April,** *19* **77**
April,

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

Victor Ortega
Victor Ortega

A 201 Affidavit of Service by Mail

LUTZ APPELLATE PRINTERS, INC.

COURT OF APPEALS
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Defendants-Appellees.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, Robert L. Martinez, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 234 East 33rd Street; New York, New York; 10016
That on the **18th** *day of* **April,** *19* **77** *deponent served the annexed*

upon **Sandy Dinko** *attorney(s) for*

in this action, at **109-08 Firwood Place**
Hollis, N.Y.

the address designated by said attorney(s) for that purpose by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.

Sworn to before me, this **18th**
day of **April,** *19* **77**.

Robert L. Martinez

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418730
Qualified in New York County
Commission Expires March 30, 1977